No. 5747

In the

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

ALEX KUSNIERZ,

Appellee.

Brief Upon Appeal From the United States District Court for the Western District of Washington, Northern Division

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellee

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STATEMENT

Alex Kusnierz, hereinafter referred to as the plaintiff, by his complaint alleges, that he enlisted for service in the United States Army on the 3rd day of October, 1917, and applied for a policy of war risk insurance as soon as the same became available, about

the month of November, 1917, in the sum of $10,000.00; that about the 24th day of December, 1917, the plaintiff was injured in a stage accident while returning to Camp Lewis, and while he was still suffering from the injury received in that accident, he was obliged to undergo an operation for goitre, and the operation was immediately followed by pneumonia and influenza, all of which disabilities had contributed to the permanent physical condition, by reason of which the plaintiff has claimed that he is entitled to the benefits of his war risk insurance, claiming to have been totally and permanently disabled within the meaning of the war risk insurance act from and since the date of his discharge, which was October 10th, 1918 (R. 2 and 3). By the defendant's answer they have admitted all the allegations of the plaintiff's complaint except Paragraph III, which paragraph sets forth the disabilities of the plaintiff, and by Paragraph II of their affirmative defense, the defendant has alleged that after discharge the plaintiff paid the premiums upon his war risk insurance policy to include the month of December, 1919, and on the 1st day of January, 1920, the plaintiff converted $5,000.00 of said term insurance to another form of policy provided by the Government, dropping the $5,000.00 balance of war risk term insurance. The premium on this converted insurance

was paid to include December, 1922, and on the 1st day of January, 1923, the plaintiff again converted to another form of policy provided by the defendant. Premiums were paid on that to include December 1st, 1927 (R. 4-6), and it further alleged that by reason of the conversions therein referred to, the plaintiff represented that he was not totally and permanently disabled prior to the said dates of conversion, and that therefore the plaintiff is estopped to assert that he is totally and permanently disabled prior to that time (R. 6).

The case was tried to a jury which resulted in the verdict finding the plaintiff totally and permanently disabled from October 10, 1918, the date of discharge, and judgment was thereafter entered from which the defendant has appealed, assigning as error:

I.

The trial court's refusal to grant the defendant's motion for a directed verdict at the end of the plaintiff's case on the ground that the evidence was insufficient to sustain a verdict, and

II.

Refusal of the court to grant its motion for directed verdict on the ground that the plaintiff is estopped

from asserting total disability prior to the date of the conversion of this policy by reason of his alleged representations, and

III.

The refusal of the trial court to grant the defendant's requested Instruction No. 7 (R. 48) as follows:

"You are instructed further that if you find for the plaintiff he is not entitled to recover except upon five thousand dollars of War Risk term insurance for the reason that it is undisputed that effective January 1st, 1920, the plaintiff converted five thousand dollars term insurance to an ordinary life Government converted policy and that such conversion constituted a merger and novation of five thousand dollars of the term insurance originally applied for by the plaintiff. The plaintiff has not brought suit upon this converted contract of insurance and therefore is not entitled to any rights or benefits thereunder."

ARGUMENT

I.

The question first raised by the defendant in its brief is whether or not the evidence was sufficient to take the case to a jury, and to sustain the burden of proof. It was only necessary for the plaintiff to show that he was disabled to such an extent as to be unable to follow *continuously* any *substantially gainful* occupation, and that such disability is founded upon con-

ditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. T. D. 20 W. R. This regulation does not require that the claimant be bedridden, but requires only that he be unable to follow continuously any substantially gainful occupation.

Law vs. U. S., 290 Fed. 972.

In discussing the interpretation of the term "total and permanent disability" the court, in the case of *Jagodnigg vs. U. S.*, 295 Fed. 917, said:

"What is meant is clearly the ability of a soldier to earn substantially through independent efforts."

And in the case of *U. S. vs. Cox*, the Circuit Court for the Fifth Circuit said:

"Ability to continuously follow a substantial, gainful occupation implies ability to compete with men of * * * average attainments under the usual conditions of life.

It does not mean that he must be unable to do any work, but only that he be unable to follow any substantially gainful occupation.

As was said by this Court in the case of *U. S. vs. Eiasson*, 20 Fed. (2d) 821:

"The words 'total' and 'permanent' * * * do not necessarily imply an incapacity to do any work at all."

And this interpretation was reaffirmed in the very recent case of *U. S. vs. Sligh*, 31 Fed. (2d) 375, in which case this Court said:

"The term 'total and permanent disability' does not mean that there must be proof of absolute incapacity to do any work at all."

And it was there held that though the plaintiff did work continuously at a gainful occupation, still he was entitled to the benefits of his insurance policy where he was suffering from tuberculosis by reason of which it was inadvisable for him to work.

The defendant in its brief has set forth a part of the testimony of each of the witnesses, which, standing alone, might seem to sustain their contention that the court erred in refusing to direct a verdict for it, but a careful analysis of the full testimony of these witnesses brings us to a different conclusion and sustains the action of the trial court.

The testimony of the witness Henehan (R. 22-23), who testified concerning two jobs the plaintiq had under him, stating that the first job the plaintiff had was neither heavy nor light work, but medium; that the plaintiff quit this job and that thereafter he, the witness, gave the plaintiff a lighter job sharpening tools and drills and "the job in the tool room was not a very active one." (R. 23.) The defendant in its brief has stated the witness' testimony to be that the plaintiff

worked there two or three months in 1918 and about eight months in 1919, but a close review of his testimony will show that the witness disqualified himself from testifying to the length of time the plaintiff worked under him by saying:

"I do not recall what part of 1918 that was."

"You would have to get that from the firm's records?

"* * * I could not say positively. * * *" (R. 22.)

And again:

"I could not say how long he worked. * * *

"You would have to see the firm records" (R. 23).

The defendant has next assumed to analyze the testimony of the witness John Kusnierz (R. 25-26) by restricting the testimony to what the witness said concerning the plaintiff's occupation at the Seattle Frog & Switch Co., where they both worked. A full analysis of that testimony will show that while the witness saw the plaintiff work, he did not make any particular note of how the plaintiff performed his work, but he did say this about it:

"He did not do as much as I did. I dont' think he did as much work as the other men. It was light work that he did." (R. 25.)

And:

"I don't remember how much he got paid, but it was less than I got." (R. 25.)

The rest of the testimony of the witness, which is not mentioned in the defendant's brief, gives a clearer conception of the plaintiff's actual condition by showing his physical reaction after working hours. The witness was especially fit to testify as to his condition inasmuch as the plaintiff lived with the witness. The witness said in substance that the plaintiff looked pale, and he felt tired and would not do any work; that he did very little work around the witness' home where the plaintiff lived—no heavy work; that the things which the plaintiff did were only the menial chores, such as sprinkling the garden and splitting light kindling. (R. 25-26.) The witness also said that the plaintiff quit his job because his chest was swollen. This indicates the reaction the plaintiff suffered from his attempted employment, and brings this case clearly within the doctrine of the *Sligh* case, *supra.*

In analyzing the testimony of Mrs. John Kusnierz (R. 26-27), sister-in-law of the plaintiff, a witness particularly acquainted with the plaintiff's home life and probably better able to show his actual condition than the witness who saw him work for short periods of time, the defendant has omitted in its brief the more essential bits of testimony. Her testimony showed that the plaintiff came to her house as soon as he was discharged, and that at that time he was very

nervous and looked sick; that at that time he did not do much around the house, and that after he had attempted to work he would come home evenings tired and nervous. She said:

"He did not look very god after he quit work the first time he worked. He looked like a sick man." (R. 27.)

Her testimony further showed that this condition continued even after he had quit working and had ben confined in the hospital at Bremerton (R. 26-27). Nor is there anything in the testimony of this witness from which the conclusion can be drawn that she was "simply guessing," which conclusion is attributed to her as a part of her testimony by the defendant in its brief.

The next witness with whom the defendant has concerned itself in this brief is the plaintiff himself. Their analysis of the plaintiff's tstimony is very brief and deals only with that period immediately after discharge, though the defendant by its answer denied that the plaintiff was ever injured or sick, as alleged in his complaint, the evidence of which is entitled to your consideration, inasmuch as the testimony of the medical witnesses is largely dependent upon the plaintiff's history, which is only set forth in his own testimony. The testimony of the plaintiff, contained on pages 36 to 44 of the Record, shows, the facts which

have contributed to the plaintiff's total and permanent disability in substance as follows:

That on the 24th day of December, 1917, he was in a Tacoma-Camp Lewis stage wreck; that he was taken to the Company's quarters and confined for three days, after which he returned to duty for a week, and then reported sick, suffering from nervousness, bruises, soreness and pains in the right side of his body, and about a month later he was sent to the base hospital. This was on or about the 21st or 22nd of January, 1918. That he underwent an operation for reasons unknown to himself, and that he remained in the hospital until the spring of 1918; and that while in the hospital, he also contracted pneumonia. That he was then given a hospital furlough, after which he returned to duty for about a week, and then reported sick again and was sent again to the hospital for three weeks or a month; that he was returned to duty for a period of about three months, after which he was discharged. It further shows that the plaintiff's chest swelled up after his return from his hospital furlough which is the same condition that forced his to quit work at the Seattle Frog and Switch Company. He then testified, concerning his work, that Mr. Henehan helped him quite a bit and that when they got a new foreman, he, the plaintiff, was put on heavier work and he got sick and had to quit. He was troubled

with nervousness, headaches and pains in his chest. He further testified that after he ceased working, he took vocational training, but that his attendance was irergular for a period covering approximately a year, after which time he was hospitalized in the United States Veterans Hospital at Tacoma for a period of three to three and one-half years. That the same conditions which have been present at all the times heretofore mentioned have prevailed up to and including the present time. On cross-examination he testified concerning his work at the Seattle Frog and Switch Company; that he was paid for some days that he didn't work. This testimony is uncontroverted and certainly derogates from the payroll records which the defendant introduced in evidence. He testified that although he was able to do light work, he was weak at times and would have to go and take a rest; that he was able to do the light work only a part of the time. (R. 39.)

This testimony of the plaintiff alone was sufficient to take the case to the jury, and if the jury believed plaintiff, he certainly was entitled to their verdict without the testimony of any other witness than himself. The plaintiff also produced three doctors as witnesses for himself, all of whom had given him examinations at various times, and all of whom are agreed that he was not able to do any work at the

time they made their examinaions, and a review of their testimony (R. 29 to 35) shows this finding in common; that the plaintiff, among other things, is suffering from neuresthenia, and that this condition is probably permanent in view of the fact that it has continued since 1918. Dr. Ristine testified, not only to neuresthenia, but to heart trouble and an inflammatory condition of the lungs, the exact nature of which he could not ascertain at the time (R. 28) and while he said he could not testify to the exact extent of the plaintiff's disability or its duration, still he did say, concerning the present time:

> "He is not fit to be employed today. As far as today is concerned, he is totally disabled." (R. 29.)

And on cross-examination he stated that he did not know whether the plaintiff was totally and permanently disabled in 1918 because he did not know anything about him at that time, but he believed that he was so disabled at that time.

Dr. Trueblood, who also testified for the plaintiff, said he found a nervousness and a dizziness caused by a disease of the semi-circular canal connected with the middle ear, and that his findings bore out the complaint of the plaintiff. The doctor also testified as follows:

> "I do not believe he will be capable of following a substantially gainful occupation" (R. 31).

And speaking of the permanency of his disability, he said:

"It has lasted all these years and it certainly is chronic. * * * I doubt if it is going to clear up * * *" (R. 31-32).

Dr. Wilt testified that his diagnosis was traumatic neurosis resulting from an injury (R. 33). Also the plaintiff was a neuresthenic, and that there was possibly a hyperthyroidism. As to the plaintiff's ability to work, this witness said:

"Generally it would render him incapable of sustained work. * * * He would be tired all the time." (R. 34.)

And as to the beginning of the plaintiff's disability this doctor testified:

"My impression and diagnosis of this man's condition were that it was first caused from that injury in the automobile accident. I believe that would totally incapacitate him and that the condition is permanent." (R. 35.)

On cross-examination he said:

"I would say he is totally disabled from following a gainful occupation at this time." (R. 35.)

With the combined testimony of the plaintiff and the medical experts last referred to, there can be no question but that the trial court properly submitted the case to the jury, and further there is no question but that the plaintiff had proven a *prima facie* case

sufficient to support the verdict of the jury and sufficient to put the defendant upon its proof. The same question was presented to this Court in the case of *U. S. vs. Eliasson, supra,* in which case this Court held that evidence of ailments and illnesses contracted while in the service and continuing thereafter, was sufficient to sustain a verdict for the plaintiff, and in this case, as in the *Eliasson* case, the court clearly advised the jury that they must be convinced from the evidence, of the plaintiff's total and permanent disability during the term of the insurance, and it was emphasized to them by repetition in the instructions. (R. 73-80).

It is the contention of the defendant in its brief that in all the foregoing testimony there is no evidence which shows the plaintiff to have been totally and permanently disabled on the 10th day of October, 1918. The defendant's contention in its brief, however, is based upon its analysis of the testimony, which analysis is neither complete nor fair, and a full consideration of all the testimony of each of the witnesses conclusively shows that plaintiff's evidence was sufficient to withstand the defendant's challenge. The medical witnesses, while they did not state definitely that the plaintiff's condition existed prior to their examinations, did state that it probably existed from and after the auto accident of which he com-

plained and which occurred long prior to his claim herein, and without an exception each doctor testified that the plaintiff was now totally disabled, and that the condition would probably be permanent. While their examinations do not date back to the plaintiff's injury, they do date back to 1924 and show the same conditions to have existed then that are existing today, and the uncontroverted testimony of Dr. Wilt (R. 35) that the plaintiff's disability arose by reason of the auto accident, and that he has been totally and permanently disabled from and after that time, was sufficient to take the case to the jury.

In the recent case of *LaMarche vs. United States*, 28 Fed. (2d) 828, a similar situation came before this court. In that case the plaintiff was discharged from service on July 16th, 1919, and his policy lapsed on July 31st, 1919; that on the 4th day of August, 1919, he complained of nervousness and was seized with violent pains and was taken to a hospital where he remained for some time. The evidence showed that this condition and the symptoms, after August 4th, 1919, did not differ materially from his condition and symptoms prior to that date, and consequently it was for the jury to determine from the evidence whether he became totally and permanently disabled from the life of his policy. In the opinion in that case the court said:

"His condition and symptoms after August 4th, 1919, did not differ materially from his condition and symptoms prior to that date, and if conditions existing on and after August 4th are attributable to the injury to the hip, might not the jury well find that similar conditions existing prior to that date arose from the same cause."

In the case at bar, as in the *LaMarche* case, the condition existing today and the condition existing in 1924 are attributed by the witnesses to the auto injury, and the jury might well find that the same conditions existing immediately after discarge were attributable to the same cause.

The defendant in its brief has argued not only the plaintiff's disability is not total, but also that his disability was not founded upon conditions which rendered it reasonably certain that it would continue throughout his life; in other words, it is their contention that the disability, if total, is not and was not on the 10th day of October, 1918, permanent. Since the permanency of the disability involves the element of time, it is submitted that where disability has existed for eleven years, that the jury is warranted in finding it to be permanent, and especially so in the testimony of Dr. Wilt that his condition is now permanent and was permanent in 1924, the time when Dr. Wilt made his first examination and diagnosis of the plaintiff's disability. (R. 35.) This view is sus-

tained by the decision in the case of *McGovern vs. U. S.*, 294 Fed. 108, affirmed 299 Fed. 302, in which the court said:

> "As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence."

Since the plaintiff's evidence was sufficient to withstand the motion for a directed verdict made by the defendant at the close of the plaintiff's case it necessarily follows that there was no error in denying the motion again when renewed by the defendant at the close of its case. Since, if the plaintiff's evidence alone was sufficient to go to the jury, it was likewise for the jury to determine upon all of the evidence whether or not the plaintiff was in fact entitled to recover and error can not be predicated upon the court's refusal to grant the renewed motion. It is therefore, unnecessary to discuss the defendant's evidence, set forth in their brief, since it is purely for the jury to determine the sufficiency of that evidence to overcome the plaintiff's evidence.

II.

The next point urged by the defendant in his brief is that the plaintiff was estopped to assert permanent and total disability prior to January 1, 1920, by rea-

son of his conversion of his term insurance at that time. The basis for their argument is that the plaintiff at the time of conversion impliedly represented to the defendant that he was not then toally and permanently disabled. The doctrine of estoppel arising as it did in equity and applying only where it would be inequitable or unjust for one party to assert certain facts by reason of his conduct or representations, has no application to an instance where the result of the representations or conduct of the party has worked no detriment to the party asserting the estoppel nor would it have any application where the equities of the situation favored the party against whom the estoppel is asserted.

In considering the law of estoppel in reference to this case we must first analyze the facts, which are as follows: The plaintiff in this case was discharged with a disability which, according to the testimony of the plaintiff's doctors, clearly rendered him incapable of following continuously a substantially gainful occupation (R. 29-31-34), the permanency of which disability, however, was questionable (R. 31), but which has by reason of its long continuation been determined to have been permanent since the plaintiff's discharge (R. 32 and 35), and the jury so found (R. 9). The policy then having matured on the 10th day of October, 1919, by reason of the happening of the

event insured against the plaintiff had nothing to convert on the 1st day of January, 1920, and the defendant had no right to convert his policy at that time. In the opinion of the Attorney General, 32 Ops. Atty. Gen. 379, it was said:

> "The term policy having matured into a claim by the happening of the event insured against it ceases to constitute 'insurance'. * * * it is 'insurance' that is made convertible."

The insurance therefore having matured into a liquidated claim the plaintiff by his attempted conversion gained nothing, and the defendant by granting the conversion lost nothing, but rather if the conversion is to be sustained the defendant will have gained to the detriment of the plaintiff, clearly not a case within the contemplation of the equitable defense of estoppel here asserted. As was well said by the court in the case of *Murphy vs. Paine*, 15 Fed. (2d) 570:

> "It has been said that estoppel is a shield and not a sword. It is available for protection and cannot be used as a weapon of assault * * *. *Estoppel may be invoked where conduct or statements have positively misled a party and are acted upon by him in good faith to his prejudice, where the conditions are known to the parties, or they both have the same means of ascertaining the truth and where they are under a duty to ascertain the truth there can be no estoppel.*" (Italics ours.)

In the instant case the facts are clearly within the above quoted decision since the defendant had the

records of this man's disability and the history of his case, and had, not equal means of ascertaining the facts, but rather they had means of ascertaining the facts which were not available to the plaintiff and which were greater than the plaintiff's, and they were under some duty to ascertain the facts. Therefore, the basic principle of estoppel, the misrepresentations of the party against whom the estoppel is asserted relied upon by the other party to his detriment, being absent, the plea of estoppel in this case must necessarily fail.

The same conclusion was arrived at in the case of *Jenkins vs. U. S.*, 22 Fed. (2d) 568, in which case the Government granted to the claimant automatic insurance, a form of insurance provided only where one in the service had died or become totally and permanently disabled without having applied for insurance. Claimant in that case accepted the automatic insurance and later brought suit on an alleged $10,000 policy of War Risk insurance. The jury having returned a verdict for the claimant, finding that the deceased had applied for War Risk insurance as alleged, the court thereafter in deciding the equitable defense of estoppel said:

"The right * * to so-called automatic insurance exist only when the one in service died without having applied for insurance. It would seem clear that no

right or authority existed, either on the part of the claimant or on the part of the bureau, to substiute automatic insurance for policy insurance where the same had been applied for. In the absence of two alternative rights, there can arise no question of an election."

And likewise in this case the bureau could not convert a policy of insurance where the same had already matured and, as in the *Jenkins* case:

"Nothing which the claimant did misled or concealed from the bureau facts resulting in prejudicial action on its part. * * * There are present in this case no facts which would warrant the conclusion that the claimant is estopped."

And to the same effect is the case of *Dobbie vs. U. S.*, 19 Fed. (2d), 656, wherein it was said:

"A true estoppel certainly dose not arise in this case as the Government has lost nothing and if, as the jury found, the paintiff has been totally and permanently disabled her policy has been a liquidated demand since that date. She owed no premiums on it, and instead of paying premiums should have been receiving monthly installment; therefore, by the reinstatement of the policy she did the Government no harm."

And, quoting further from the *Dobbie* case, the facts of which are directly analogous to the facts in the instant case:

"If she is estopped by the application to reinstate the policy and the payment of the premiums upon it thereafter to obtain that which she had already by her disability become entitled to, the proceeds of the policy as they accrued, clearly, then any person who

in ignorance of his real condition continues to pay premiums is estopped, upon ascertaining that condition, to claim a total loss, for the payment of the premium is an assertion that the policy had not matured; but that this is not the law has already been decided. *New York Life Ins. Co. vs. Brame*, 112 Miss. 828, 73 So. 806, L. R. A. 1918B, 86."

And to the same effect the case of *Andrews vs. U. S.*, 28 Fed. (2d) 904, decided that a claimant who converted his policy, in the mistaken belief that he would recover from his disability, would not be estopped by representations made in his application to convert, the court said:

"An insured under one of these policies is not justified in making a claim until he is toltally disable and *until he believes it to be permanent. It is quite true that a man may be permanently disable and not know it.* * * * If at the time he should state that he believed he would recover, and was not permanently disabled, it would be a truthful statement of his belief and could not operate as an estoppel." (Italics ours.)

Another well considered case denying the equitable defense of estoppel is that of *Larsen vs. U. S.*, 29 Fed. (2d) 847, in which the facts are substantially the same as those in this case. In the *Larsen* case only $2,000 of a $10,000 War Risk insurance policy had been converted (in the case at bar only $5,000), and in deciding that case the court said:

"All needed diagnoses were in its (bureau's) possession, * * * *the defendant upon the record must*

have known the deceased's condition. The fact deceased did not know his condition and relied upon the bureau in his application for reinstatement and conversion, cannot change the plaintiff's status. The defendant on permanent and total disability was bound to pay by the terms of the policy, the legal obligation having matured. The liability became fixed in the full amount, and acceptance of a part of the due payment, even though it may have been through a reissued policy in lieu of the old, does not change the status nor bar the plaintiff's claim to the balance. *There was no benefit of right accruing to the plaintiff or damage to the defendant* (cases cited) *and the plaintiff gained nothing* * * * the fact is, however, deceased *had due $10,000 and the defendant seeks to satisfy it by the payment of $2,000 and in this the plaintiff would be greatly wronged.*" (Italics ours.)

In the instant case, therefore, the policy having matured and having become a liquidated demand upon the 10th day of October, 1919, the plaintiff was not estopped by the conversion nor can the defendant assert a discharge of its obligation by anything other than the payment of the liquidated demand.

The facts further show that in converting the plaintiff relied upon representations made to him by the bureau (R. 43). At the time the plaintiff converted he had in his possession a folder, being plaintiff's Exhibit No. 1, sent to him by the bureau and advising him that term insurance would be discontinued and that to protect himself he must convert his policy on or prior to a certain date. At the time of receiving this circular the plaintiff was totally and permanently

disabled but the permanency of his disability being dependent upon the passage of time he could not then safely assert a right under the original $10,000 policy because of inability to prove the permanency of his disability, and as the court said in deciding the question (R. 45):

"The court must find upon the equitable defense that the plaintiff with knowledge of his rights and status under the war risk insurance policy and law, did not waive any right under the war risk insurance, and that the conversion of a part of the policy was done without any legal advice and pursuant to circular received by him from the agency of the defendant, calling his attention to the fact that the time when the change could be made was about to expire and that prompt action should be taken, * * *. If the plaintiff was at the time totally and permanently disabled within the intent and purview of the law under which the war risk insurance policy was issued, and such disability was reasonably certain to continue throughout his life, then the policy matured and he would not be bound by the conversion thereafter."

The plaintiff having gained nothing by the conversion and the defendant having lost nothing, the plaintiff is not estopped and what he did was not to seek a new contract from the defendant but merely to protect himself until such a time as it could be truthfully determined that his total disability was permanent. He made no election. He has made no claim against the defendant upon the converted policy and in fact upon the determination of the permanency of his con-

dition he lapsed his converted policy on January 1, 1928, and could not thereafter assert any liability of the defendant upon that policy.

The defendant in its brief has taken the inconsistent positions of asserting both that the converted policy herein is valid so as to estop the plaintiff and also that the defendant could not issue insurance to one who was permanently and totally disabled, as the jury found this plaintiff to be.

The defendant in its brief has cited but one case in support of its contention herein and that is the case of *Stevens vs. U. S.*, 29 Fed. (2d) 904. The facts in that case, however, are different from the facts in this, and upon the face of the decision it clearly appears that the claimant in that case *was not either totally or permanently disabled prior to the reinstatement* of his policy and therefore the reinstatement in that case was valid and the estoppel was an estoppel not by representation but by contract. It is clear that there can be no estoppel by contract where the contract is invalid, as in this case. Here, of course, the contract was clearly invalid and void *ab initio* because at the time the policy here was issued the event sought to be insured against had already happened. In the *Stevens* case the evidence of the doctors who testified for the plaintiff showed that prior to the time of trial

they did not think he was totally disabled and the plaintiff himself testified that he did not think he was totally disabled at the time of the reinstatement, whereas in the present case the doctors who testified for the plaintiff were in accord that his disability was both total and permanent and that it had been so since the accident he suffered while in the service and the subsequent diseases and operations which he had (R. 29-33). Further distinguishing the *Stevens* case we find that in that case the reinstated policy was still in force at the time of the trial and had never been repudiated by the insured and the court said:

"That plaintiff * * * was estopped to deny this basic fact (that he was not totally and permanently disabled) *so long as the contraact stood*" (Italics ours.)

And the rule is stated in 21 C. J. 1111, as follows:

"If, in making a contract the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, *they are estopped to deny the fact so long as the contract stands* in the absence of fraud, accident or mistake."

That the *Stevens* case is not applicable here is clearly shown by the facts, first, that in this case the converted policy of insurance was no longer of any force and effect, and second, because the converted policy was based upon a mistaken fact, the permanency

of the plaintiff's total disability and further the court in the *Stevens* case found:

"That the plaintiff * * * elected to have his insurance reinstated upon the terms specified in the act permitting reinstatement."

In the present case the plaintiff acted under a mistake as to the permanency of his disability *and did not elect* to forfeit the rights under his war risk policy in favor of a contingent right under the converted policy, but rather he sought only to protect himself in the event his disability was not permanent; nor could there be any election in this case because, as was said in the case of *Bierce v. Hutchins*, 205 U. S. 340, 51 L. Ed. 828:

"Election is simply what its name imports; a choice between an overt oct, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. * * * In all such cases the characteristic fact is that one party has a choice independent of the assent of anyone else."

In the present case the plaintiff had no inconsistent rights from which to choose. If his policy had matured he had no right to convert, and if it had not matured he had no right upon which to base a claim on the term insurance policy. There being then no inconsistent rights there could not have been an election, and as the Court said in the *Dobbie* case, *supra*:

"Her position in making the application and the representations in it was that of one *acting not upon*

election, but upon a hypothesis, and that, that hypothesis turning out to be incorrect, no estoppel can arise from it." (Italics ours.)

The plaintiff in this case, as in the *Dobbie* case, having acted merely upon an hypothesis, did not make an election, nor could he make an election, and "that hypothesis turning out to be incorrect, no estoppel can arise from it." The *Stevens* case expressly excludes the doctrine of the *Dobbie* case in its decision by distinguishing the same on the fact that the plaintiff in the *Dobbie* case did not intend to make an election. It further seems apparent that in the *Stevens* case the full $10,000 term insurance was reinstated, in which event the plaintiff would not be materially damaged by the enforcement of the reinstated policy rather than the term policy.

Here, however, as in the Larsen case, supra:

"The fact is, however, deceased had due $10,000, and the defendant seeks to satisfy it by the payment of $2,000, and in this the plaintiff would be greatly wronged. * * *, and *to prevail the defendant must clearly show that the issuance is free from mistake or illegality, perfectly fair, equal and just, not only in its terms but in the circumstances.*" (Itaalict ours.)

The defendant, therefore, having issued a void policy and having made a void contract, where they were obliged to ascertain the facts, must be estopped from asserting any representations made by the plaintiff

in procuring the contract, and there would be an estoppel against an estoppel, and both parties would then be free to assert the matters against which the estoppel has been urged. The doctrine is stated thus in 21 C. J. 1139:

"Where an estoppel exists against an estoppel the matter is set at large. It may happen that a plaintiff being estopped to allege a set of facts which the derendant is estopped to deny, the interestes of justice will require that both be liberated."

Under this doctrine the matters thus set at large would be evidence to be considered by the court or jury in determination of the fact.

If the court in this instance is to sustain the estoppel, and assuming the plaintiff in this case would have a right of action on his converted policy, then on the trial of such a cause the government could plead an avoidance by reason of the misrepresentations made in procuring the conversion, the jury having found as a fact that the plaintiff was totally and permanently disabled prior to the date of his conversion. That this is the attitude of the Bureau and that they would plead such an avoidance is conclusively shown by their action in the cases of *Thomas V. Russell vs. U. S.*, Numbers 12192½ and 20027, in the District Court for the Western District of Washington, Northern Division. In the first case, No. 12192½, the plaintiff claimed total and permanent disability from date of

discharge. The Government pleaded an estoppel by reason of a reinstatement made eight months after lapsation of the term policy. The case was dismissed before trial and subsequently it was refiled as case No. 20027, at which time the plaintiff claimed liability of the defendant on the reinstated policy, the full $10,000 having been reinstated. In answering this complaint the defendant has pleaded an avoidance of liability by reason of misrepresentation in procuring the reinstatement. There is one reported case somewhat similar, being the case of *Jensen vs. U. S.*, 29 Fed. (2d) 951. In that case the plaintiff claimed by his complaint liability against the Government on a reinstated policy and by its answer the defendant sought to avoid the policy by pleading the plaintiff was totally and permanently disiabled at the time of the reinstatement.

It is, therefore, submitted that this case is directly in point with the prior cases where the defense of estoppel has been denied, and in this case, as in those, no estoppel can apply for the reasons, first: that as in the *Dobbie* case the converted policy being based upon a hypothesis, which is incorrect, is void and no election has been made by the plaintiff; second: that because, as in the *Jenkins* case and the *Andrews* case, the plaintiff here had no right to convert and the defendant had no right to grant a conversion, and nothing

which the plaintiff did resulted in prejudice to the defendant or misled the defendant; and third: because as in the *Larsen* case, the plaintiff's rights under the term policy had become a liquidated claim prior to the conversion, and this claim can not be discharged except by payment in accordance with the terms of his contract.

III.

The next assignment of error in the defendant's brief is the refusal of the court to give defendant's requested instruction No. 7, as follows: (R. 48 and 49.)

"You are instructed further that if you find for the plaintiff he is not entitled to recover except upon five thousand dollars of war risk term insurance for the reason (48) that it is undisputed that effective January 1st, 1920, the plaintiff converted five thousand dollars term insurance to an ordinary life Government converted policy and that such conversion constituted a merger and novation of five thousand dollars of the term insurance originally applied for by the plaintiff. The plaintiff has not brought suit upon this converted contract of insurance and therefore is not entitled to any rights or benefits thereunder."

While the instruction was requested on the theory that the plaintiff's converted policy was valid and apparently that the plaintiff could recover on that instead of the original $10,000 term insurance which it substituted, still in the brief the defendant has urged

that it should have been given for the reason that otherwise plaintiff would have $15,000 insurance. The fallacy of this argument is apparent upon its face and it needs no discussion to show to this court that if the plaintiff recovered upon the original policy the converted policy would necessarily be void and no recovery could be had thereon. The defendant has urged that the converted policy is not void, but it is needless to cite to this court the numerous cases which hold that a policy of insurance is void where there is no risk which can be insured against. Here, of course, the jury's finding that the plaintiff was totally and permanently disabled prior to the conversion necessarily voids the converted policy since the event attempted to be insured against had already occurred. It is further urged in the defendant's brief that the converted policy must first be cancelled and the term policy restored. But this is unnecessary and, in fact, could not be done, since the term policy has matured prior to lapsation, by reason of which maturity the converted policy was void *ab initio* and a nullity, and the enforcement of the rights under the matured policy must necessarily involve a cancellation of the converted policy in fact, even though the converted policy could not exist in law. It is apparent, therefore, that the court committed no error in refusing this instruction.

For the reasons herein set forth and it appearing that there is no merit in any of the alleged assignments of error, it is submitted that the court did not err in entering judgment upon the verdict of the jury and that therefore the judgment must be affirmed.

Respectfully submitted,

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